No. 286. 45. Com on
Brief of Hume for D. C

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Nov. 15, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS WRIT OF ERROR, WITH BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR IN SUPPORT THEREOF.

F. CHARLES HUME,
Counsel for Defendants in Error.

Clarke & Courts, Manufacturing Stationers, Galveston.

Filed the ..... *day of* ..... 189....

.....

Clerk Supreme Court.

No. 286.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v.} ON MOTION TO DISMISS WRIT OF ERROR.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court:

The defendants in error respectfully move the court to dismiss said writ of error; for that the judgment of the Circuit Court of Appeals in said case is final, and this court is without jurisdiction to review it upon said writ. They show—

That the action was brought in the trial court by the plaintiff, Jacob Sonnentheil, a citizen of the State of

Texas, against the defendant, The Christian Moerlein Brewing Company, a citizen of the State of Ohio, and the defendant J. J. Dickerson, a citizen of the State of Texas, to recover of "the said defendants" damages alleged to have been suffered by the plaintiff from the seizure and taking of his goods by said Dickerson under and by virtue of a writ of attachment issued out of said court in a certain suit there pending between said Brewing Company and third parties—the said Dickerson then and there being and acting as the marshal of said court, "and being thereto directed and induced by the said The Christian Moerlein Brewing Company."

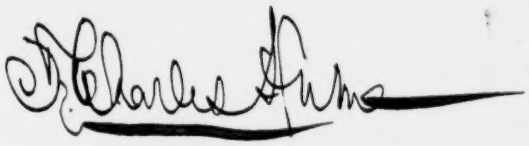
That the citations to said defendants commanded them to appear and answer the plaintiff's petition, "in an action of damages for wrongfully suing out attachment."

That no instruction to the jury, whether given or refused, was predicated upon the liability of the defendants severally, or otherwise than as joint wrongdoers, and the verdict found by the jury and the judgment rendered thereon by the court were for the defendants.

That the judgment of the trial court was affirmed, and a rehearing denied to the plaintiff in error, by the Circuit Court of Appeals.

Wherefore they say that, in respect of the right of the plaintiff in error to have it reviewed in this court upon writ of error, the case is within the terms, meaning and intent of sec. 6 of the Act of Congress of March 3, 1891, establishing the Circuit Courts of Appeals, providing that judgments of the said courts shall be final in

all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States.



Counsel for Defendants in Error.

No. 286.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JACOB SONNENTHEIL, PLAINTIFF IN ERROR,

v. } STATEMENT AND ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

THE CHRISTIAN MOERLEIN BREWING COMPANY AND J. J. DICKERSON, DEFENDANTS IN ERROR.

STATEMENT.

The petition of the plaintiff below, plaintiff in error in the Circuit Court of Appeals and here, filed January 25, 1893, was thus:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, SITTING AT GALVESTON.

JACOB SONNENTHEIL
v.
J. J. DICKERSON AND OTHERS. } No. 1702.

To the Honorable the Above-Named Court:

The petition of Jacob Sonnentheil, who resides in the county of Galveston, and State of Texas, and who is a citizen of said

State, plaintiff, against The Christian Moerlein Brewing Company, a corporation created by and existing under the laws of the State of Ohio, and a citizen of said State of Ohio, where also it has its domicile in Hamilton County, and of J. J. Dickerson, who is a citizen of the State of Texas, and resides in the county of Lamar, in said State, defendants, respectfully shows:

That heretofore, to wit: on the 23d day of December, 1892, your petitioner was the lawful owner and possessor of, and had good title to a large stock of goods, wares and merchandise, store fixtures, tools, implements, horses, mules, wagons and trucks, and harness and other personal property in the county of Galveston, all of which said property was then and there of the reasonable value of eighty-four thousand two hundred and seventy-three dollars and five cents ($84,273.05).

That on or about the said 23d day of December, 1892, the said J. J. Dickerson then and there being the marshal of this honorable court, and then and there acting as such by and through his deputy John H. Whalen, and under a certain writ of attachment issued out of this honorable court in a certain suit therein pending and wherein the said The Christian Moerlein Brewing Company was plaintiff and Moses Freiberg, and Samuel Klein and Joseph Seinscheimer, as partners doing business under the firm name and style of Freiberg, Klein & Co., were defendants, and being thereto directed and induced by the said The Christian Moerlein Brewing Company, forcibly seized and took all of the said property from the possession of your petitioner and without paying him any portion of the value thereof in any way. That by reason of the premises your petitioner has been damaged in the sum of one hundred thousand dollars.

That the said The Christian Moerlein Brewing Company has an agent, agency and office and representative in the county of Galveston aforesaid, and that L. A. Grelling is the agent and representative of the said defendant The Christian Moerlein Brewing Company in and for said county of Galveston, where the said L. A. Grelling resides.

Wherefore petitioner prays for citation against the said defendants as in like cases is by law provided, and that upon hearing he have judgment against the said defendants for his damages aforesaid, with interest and costs, and for such other and further legal relief as he may be entitled to. R., 2–3.

The citations to the respective defendants were identical in terms—commanding them, severally, to appear and answer the plaintiff's petition, "in an action of damages for wrongfully *suing out* attachment." R., 4, 6.

There was no contention by the plaintiff that one defendant was liable if the other was not: no instruction to the jury was asked or given save upon the assumption that both defendants were liable if either was, and that the act for which Dickerson's liability was alleged was directed and induced by his co-defendant. R., 2, 226–235.

The verdict and judgment in the trial court for the defendants was approved, and motion for rehearing denied, by the Circuit Court of Appeals. R., 259–260.

The petition to this court for writ of error avers that the judgment complained of is not final, for the reason—

> That said cause is not one in which the jurisdiction of the said Circuit Court or of said Circuit Court of Appeals depended entirely upon the diverse citizenship of the parties thereto; but that the plaintiff and one of the defendants, to wit, J. J. Dickerson, were at the time of the institution of said suit citizens of the same State, namely, the State of Texas, and jurisdiction of said courts as to him depended upon the fact that the said Dickerson was at the date of the trespasses and wrongs complained of by the plaintiff in said cause, United States marshal; and was sued for an alleged trespass committed by him, as such marshal, in seizing the property of said plaintiff under an attachment writ in his hands, as said marshal, sued out in said Circuit Court against the property of the firm of Freiberg, Klein & Co., the defendants in said attachment suit; and the said Dickerson, by way of answer in said cause, justified said seizure under the authority of the writ directed to and held by him as United States marshal and executed by him as such by levying upon and seizing said property. R., 264.

PROPOSITION AND ARGUMENT OF THE DEFENDANTS IN ERROR.

The judgment of the Circuit Court of Appeals is final, not less in the case, as here, where as to one only of two defendants sued for a joint tort jurisdiction depends entirely on the fact that that defendant and the plaintiff are citizens of different States, than in the case where as to a sole defendant jurisdiction depends entirely on the fact that such defendant and the plaintiff are citizens of different States.

Or, stated in other terms: The judgment of the Circuit Court of Appeals is final, unless as to *all* parties there is jurisdiction upon a ground *other than* (though as to some it may be *additional to*) that of diverse citizenship.

We are not aware that the question of the finality of a judgment of a Court of Civil Appeals in a case like this, has ever been decided by, or presented to, this court.

Colorado Mining Company v. Turck, 150 U. S., 138, affirms the finality of a judgment of a Circuit Court of Appeals where the opposite parties consisted of a *sole* plaintiff and a *sole* defendant, and jurisdiction of the Circuit Court was invoked on the single ground of adverse citizenship, although another ground of jurisdiction subsequently developed. It was there said:

If the plaintiff had invoked it (jurisdiction) on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented. 144.

Assuming that in the case suggested by the court the judgment of the Circuit Court of Appeals would not be final, we maintain that similar conditions must exist to deprive a judgment of that court of finality in a case where, instead of a single party on each side, there are two or more parties on one side or on each side. If it be true that as between a sole plaintiff and a sole defendant of diverse citizenship there can be no review by this court of the judgment of the Circuit Court of Appeals unless the jurisdiction of the Circuit Court was invoked upon a ground other than and additional to that of diverse citizenship, it should seem to be equally true that no such review can be had where there are two or more parties on one side, or on each side, as to some of whom there was jurisdiction in the Circuit Court only upon a ground or grounds other than diverse citizenship, and as to the others there was jurisdiction, because of diverse citizenship, unless as to such others there was *also* jurisdiction upon a ground or grounds other than diverse citizenship.

There is here but a single action for damages for a joint tort of two defendants. Both are liable or neither is. In that form, and in that only, the plaintiff pleads and seeks judgment. But for the diverse citizenship of the plaintiff and the Christian Moerlein Brewing Company there would have been no jurisdiction of the *one*

action against the *two* defendants to recover damages *in solido* for the single trespass committed by the one under the direction of the other.

Counsel for Defendants in Error.